

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVE F. TIBBETTS and
TAMBERLYN TIBBETTS,

Plaintiffs,

v.

KELLER MORTGAGE, LLC, dba
KELLER MORTGAGE, NATIONSTAR
MORTGAGE LLC, and NATIONSTAR
MORTGAGE LLC, dba MR. COOPER,
U.S. BANK NATIONAL
ASSOCIATION and DOES 1-20,
inclusive,

Defendants.

No. 2:23-cv-00596-JAM-CKD

**ORDER GRANTING DEFENDANT KELLER
MORTGAGE, LLC'S MOTION TO
DISMISS**

This case arises from a mortgage rescission transaction between Plaintiffs Steve F. Tibbetts and Tamberlyn Tibbetts (collectively, "Plaintiffs") and Defendant Keller Mortgage, LLC, dba Keller Mortgage ("Defendant Keller"). Plaintiffs' claim the actions of Defendant Keller, as well as those of Defendant U.S. Bank National Association ("Defendant U.S. Bank N.A."), Defendant Nationstar Mortgage, LLC. ("Defendant Nationstar"), and Defendant Nationstar Mortgage LLC, dba Mr. Cooper ("Defendant Cooper"), after Plaintiffs rescinded their loan agreement, resulted in damages to Plaintiffs' credit ratings and has caused Plaintiffs

1 to suffer emotional distress.

2 Before the Court is Defendant Keller's motion to dismiss
3 Plaintiffs' claims against Defendant Keller for (1) Breach of
4 Contract; (2) Breach of Fiduciary Duty; and (3) Constructive
5 Fraud. See Mot. To Dismiss. ("Mot."), ECF No. 19. Additionally,
6 Defendant Keller moves the Court to dismiss Plaintiffs' request
7 for attorney's fees and punitive damages. Id. Plaintiffs
8 opposed this Motion. Opp'n, ECF No. 22. Defendant Keller
9 replied. Reply, ECF No. 23.

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11 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

12 The facts are taken from the Second Amended Complaint
13 ("SAC"), as well as the exhibits filed in support of the SAC, and
14 assumed to be true for the purposes of this motion. See Federal
15 Rules of Civil Procedure Rule 10(c) ("A copy of a written
16 instrument that is an exhibit to a pleading is a part of the
17 pleading for all purposes.").

18 In March of 2021, Plaintiffs took out a home equity line of
19 credit through Defendant Keller ("Original Equity Loan"), secured
20 against their real property. SAC ¶ 12, ECF No. 17.

21 In April of 2022, Plaintiffs began the process of
22 refinancing the Original Equity Loan. Id. ¶ 13.

23 In May of 2022, Defendant Keller issued a new loan to
24 Plaintiffs ("May 2022 Refinanced Equity Loan"). Id. ¶ 14.
25 Plaintiffs were to use the May 2022 Refinanced Equity Loan to pay
26 the balance on the Original Equity Loan and begin a construction
27 project on their real property. Id.

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1 In June of 2022, Plaintiffs received a letter from Defendant
2 Keller advising them that during closing of the May 2022
3 Refinanced Equity Loan, Defendant Keller provided an incorrect
4 Right to Cancel form to Plaintiffs. Id. ¶ 16. Defendant Keller
5 provided Plaintiffs a new form, extending Plaintiffs' deadline to
6 cancel the May 2022 Refinanced Equity Loan. Id.; See also Exh. 1
7 to SAC, ECF No. 17.

8 Prior to the extended deadline, Plaintiffs signed the new
9 form and sent the executed document to an employee of Defendant
10 Keller, in accordance with the instructions on the form. SAC
11 ¶ 17; Exh. 1 to SAC. Defendant Keller failed to respond to this
12 executed form. SAC ¶ 18.

13 On July 7, 2022, Defendant Keller and Plaintiffs opened
14 escrow to rescind the May 2022 Refinanced Equity Loan. Id.
15 ¶¶ 18, 47. At some point before this date, the May 2022
16 Refinanced Equity Loan was sold by Defendant Keller to Defendant
17 U.S. Bank N.A. Id. ¶ 19. Defendant Cooper became the servicer.
18 Id.

19 On July 25, 2022, Defendant Keller issued a new loan to
20 Plaintiffs and Plaintiffs returned the construction funds,
21 placing Plaintiffs in the position they were prior to the May
22 2022 Refinanced Equity Loan. Id. ¶¶ 18, 36.

23 At some point between July 7, 2022, and July 25, 2022, the
24 May 2022 Refinanced Equity Loan was repurchased by Defendant
25 Keller from Defendant U.S. Bank N.A. Id. ¶ 20. As part of the
26 repurchase, Defendant Keller was required to reconvey the May
27 2022 note and deed of trust. Id. ¶ 37; Exh. 6 to SAC.

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1 Plaintiffs allege they did not receive a copy of the
2 recorded Substitution of Trustee and Full Reconveyance, in
3 violation of California Civil Code § 2941. See generally SAC
4 ¶¶ 22, 41, 52, 54, 58. Additionally, Plaintiffs allege Defendant
5 Keller failed to notify Defendants U.S. Bank N.A., Nationstar,
6 and Cooper that a reconveyance had taken place. Id. ¶ 40.

7 Plaintiffs contend the failure of Defendant Keller to mail
8 them a copy of the reconveyance documents caused Defendant Cooper
9 to continue seeking enforcement of the May 2022 Refinanced Equity
10 Loan after it was rescinded. See generally id. ¶¶ 23-31. As a
11 result, Plaintiffs were reported by Defendant Cooper as
12 delinquent on the May 2022 Refinanced Equity Loan, which resulted
13 in "significant deterioration of their credit worthiness." Id.
14 ¶ 33.

15 Additionally, Plaintiffs claim Defendant Keller breached its
16 fiduciary duty to act in the best interest as trustee of the deed
17 of trust under California Civil Code § 2941.

18 Finally, Plaintiffs allege Defendant Keller committed
19 constructive fraud under California Civil Code § 1573.

20 21 II. OPINION

22 A. Legal Standard

23 A Rule 12(b)(6) motion challenges the complaint as not
24 alleging sufficient facts to state a claim for relief. Fed. R.
25 Civ. P. 12(b)(6). "To survive a motion to dismiss [under
26 12(b)(6)], a complaint must contain sufficient factual matter,
27 accepted as true, to state a claim for relief that is plausible
28 on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)

1 (internal quotation marks and citation omitted). While
2 "detailed factual allegations" are unnecessary, the complaint
3 must allege more than "[t]hreadbare recitals of the elements of
4 a cause of action, supported by mere conclusory statements."
5 Id. When a plaintiff fails to "state a claim upon which relief
6 can be granted," the Court must dismiss the suit. Fed. R. Civ.
7 P. 12(b)(6).

8 In considering a motion to dismiss for failure to state a
9 claim, a court generally accepts as true the allegations in the
10 complaint and construes the pleading in the light most favorable
11 to the plaintiff. Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580,
12 588 (9th Cir. 2008). "In sum, for a complaint to survive a
13 motion to dismiss, the non-conclusory 'factual content,' and
14 reasonable inferences from that content, must be plausibly
15 suggestive of a claim entitling the plaintiff to relief." Moss
16 v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

17 To defeat a motion to dismiss, a plaintiff must "plead
18 enough facts to state a claim to relief that is plausible on its
19 face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570
20 (2007). Plausibility under Twombly requires "factual content
21 that allows the court to draw a reasonable inference that the
22 defendant is liable for the misconduct alleged." Ashcroft, 556
23 U.S. at 678. "At this stage, the Court 'must accept as true all
24 of the allegations contained in a complaint.'" Id. But it need
25 not "accept as true a legal conclusion couched as a factual
26 allegation." Id.

27 Conclusory allegations are not to be considered in the
28 plausibility analysis. Id. at 679 ("While legal conclusions can

1 provide the framework of a complaint, they must be supported by
2 factual allegations.”)

3 B. Judicial Notice

4 Defendant Keller requests the Court take judicial notice of
5 three documents: (1) the recorded Deed of Trust executed by
6 Plaintiffs for the May 2022 Loan; (2) the recorded Deed of Trust
7 executed by Plaintiffs for the July 2022 Loan; and (3) the
8 recorded Substitution of Trustee and Full Reconveyance for the
9 May 2022 Loan. Mot. at 2; Req. for Judicial Notice, ECF No. 19-
10 2. The Court does not need to take Judicial Notice of these
11 documents since it can, and has, considered them under the
12 incorporation-by-reference doctrine. See Khoja v. Orexigen
13 Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018)
14 (explaining that unlike rule-established judicial notice,
15 incorporation-by-reference is a judicially created doctrine that
16 treats certain documents as though they are part of the
17 complaint itself when the plaintiff refers extensively to the
18 document or it forms the basis of plaintiff's claim).

19 C. Discussion

20 1. Claim One: Breach of Contract

21 In general, real estate contracts are subject to the
22 general law of contracts. The elements for a breach of contract
23 claim include the following: (1) the contract, (2) plaintiff's
24 performance or excuse for nonperformance, (3) defendant's
25 breach, and (4) the resulting damages to plaintiff. Careau &
26 Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1388
27 (1990).

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1 Here, Plaintiffs argue Defendant Keller breached "both the
2 May 2022 [Refinanced Equity] Loan and the July 2022 Loan." SAC
3 ¶ 40. These breaches, Plaintiffs allege, occurred when
4 Plaintiffs "had not received a copy of the Substitution of
5 Trustee and Full Reconveyance" prepared and recorded by
6 Defendant Keller's legal team. SAC ¶ 37. Plaintiffs claim they
7 performed all obligations required of them, however, Defendant
8 Keller failed to notify the purchaser of the May 2022 Refinanced
9 Equity Loan that a reconveyance took place. Id. ¶ 40.
10 Defendant Keller, Plaintiffs argue, breached its obligations as
11 required under California Civil Code § 2941. Id. ¶ 41.

12 Defendant Keller, on the other hand, contends Plaintiffs'
13 claim fails because Plaintiffs have failed to allege a contract
14 that required Defendant Keller to notify the owners of the May
15 2022 Refinanced Loan. Mot. at 5:24-26. The Court agrees.

16 Plaintiffs have not provided the Court with any evidence
17 that there was an agreement between Plaintiffs and Defendant
18 Keller which imposed upon Defendant Keller an obligation to
19 notify the May 2022 Refinanced Equity Loan's purchaser of the
20 reconveyance. Plaintiffs reference their deed of trust with
21 Defendant Keller, stating that paragraph 23 of the deed of trust
22 requires Defendant Keller to request that the trustee reconveys
23 the property back to Plaintiffs after full repayment. SAC ¶ 37.

24 The full terms of paragraph 23 state:

25 **23. Reconveyance.** Upon payment of all sums secured by
26 this Security Instrument, Lender shall request Trustee
27 to reconvey the Property and shall surrender this
28 Security Instrument and all notes evidencing debt
Trustee shall reconvey the Property without warranty
to the person or persons legally entitled to it.

1 Lender may charge such person or persons a reasonable
2 fee for reconveying the Property, but only if the fee
3 is paid to a third party (such as the Trustee) for
4 services rendered and the charging of the fee is
permitted under Applicable Law. If the fee charged
does not exceed the fee set by Applicable Law, the fee
is conclusively presumed to be reasonable.

5 Exh. 6 to SAC, ECF No. 17. Although there is a requirement that
6 Defendant Keller request the trustee reconvey the property to
7 Plaintiffs, there are no terms requiring Defendant Keller to
8 notify the purchaser of the reconveyance, nor to provide
9 Plaintiffs a copy of the Substitution of Trustee and Full
10 Reconveyance. Plaintiffs' allegations in the SAC are
11 insufficient to support their breach of contract claim.

12 The Court notes, within their breach of contract cause of
13 action, Plaintiffs allege Defendant Keller "breached its
14 obligations as a Trustee to the [Plaintiffs] as required by
15 Civil Code section 2941." SAC ¶ 41. While California Civil
16 Code § 2941 imposes statutory requirements on Defendant Keller
17 after an obligation has been satisfied, See Cal. Civ. Code
18 § 2941(b), an action under § 2941 is one in tort rather than
19 contract because it seeks damages for violation of a statutory
20 duty. Pintor v. Ong, 211 Cal. App. 3d 837, 841 (1989). The
21 duty to reconvey exists in express provisions of the statute,
22 regardless of any contractual obligations. Id. Therefore, if
23 Plaintiffs are claiming that Defendant Keller violated a
24 statutory requirements of § 2941, the action would be in tort
25 not breach of contract. Accordingly, Plaintiffs' claim for
26 breach of contract is dismissed without prejudice.

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2. Claim Two: Breach of Fiduciary Duty

Ordinarily, Plaintiffs' claim is no fiduciary duty in a lender-borrower relationship. Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 206 (2012) ("No fiduciary duty exists between a borrower and lender in an arm's length transaction."); Lawrence v. Bank of Am., 163 Cal. App. 3d 431, 437 (1985); Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476 (1989). A lender owes no duty of care to a borrower when the lender's involvement of the loan does not exceed the customary role in arm's length lending and servicing. Sheen v. Wells Fargo Bank, N.A., 12 Cal. 5th 905, 927 (2022), reh'g denied (June 1, 2022).

In a lender-borrower relationship, a special relationship can exist in certain circumstances, which may result in fiduciary obligations, however, the relationship must be beyond the scope of the traditional arm's length transaction. Barrett v. Bank of Am., 183 Cal. App. 3d 1362, 1369 (1986) ("Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another."); Brown v. Wells Fargo Bank, N.A., 168 Cal. App. 4th 938, 961 (2008) (determining that a bank's employee inducing elderly and frail individuals to rely on the bank to handle their financial affairs constitutes a fiduciary relationship.). A lender will owe a fiduciary duty to a borrower if it excessively controls or dominates the borrower. Pension Tr. Fund for Operating Engineers v. Fed. Ins. Co., 307 F.3d 944, 955 (9th Cir. 2002).

In lending transactions involving deeds of trust, a trustee of a deed of trust is not a true trustee and does not hold

1 fiduciary obligations. Yvanova v. New Century Mortg. Corp., 62
2 Cal. 4th 919, 927 (2016). A trustee of a deed of a trust merely
3 acts as an agent for the borrower-trustor and the lender-
4 beneficiary. Id.; Biancalana v. T.D. Serv. Co., 56 Cal. 4th
5 807, 819 (2013).

6 Here, Plaintiffs argue Defendant Keller breached their
7 fiduciary duty as trustee of the deed of trust. SAC at ¶ 48.
8 Plaintiffs argue upon the recordation of the Substitution of
9 Trustee and Full Reconveyance, Defendant Keller became the
10 trustee of the deed of trust and owed a duty to "act with the
11 utmost good faith in the best interests of Plaintiffs." Id.
12 Plaintiffs argue Defendant Keller breached this duty when it
13 failed to act as a reasonably careful loan provider and failed
14 to fulfill its obligations under California Civil Code § 2941.
15 Id. ¶¶ 51, 52.

16 Defendant Keller, however, argues it was not a fiduciary.
17 Mem. in Supp. of Mot., ECF No. 19-1 at 9:15-17. Rather, its
18 relationship with Plaintiffs was that of a lender-borrower under
19 a contract. Id.

20 Plaintiffs claim a fiduciary relationship began when
21 Defendant Keller stepped in as trustee, Opp'n at 14, and
22 Defendant Keller breached this duty when it failed to provide a
23 copy of the recorded reconveyance to Plaintiffs. Id. The
24 failure to provide this document was the proximate cause of
25 damages suffered by Plaintiffs. Id.

26 Here, the facts establishing the parties' relationship can
27 be summarized as follows: (a) Defendant Keller was the initial
28 loan provider of the Original Equity Loan; (b) Defendant Keller

1 and Plaintiffs reached an agreement on refinancing the Original
2 Equity Loan; and (c) Plaintiffs properly rescinded that loan
3 with Defendant Keller, placing them back in the position they
4 were prior to the refinance.

5 The Court finds that no fiduciary relationship between
6 Plaintiffs and Defendant Keller existed. Although Defendant
7 Keller was the trustee identified in the deed of trust, the law
8 is clear that a trustee of a deed of trust is not a fiduciary.
9 There are no fiduciary obligations as a trustee of a deed of
10 trust, or even just as a lender, absent facts suggesting
11 otherwise. Yvanova v. New Century Mortg. Corp., 62 Cal.4th at
12 927.

13 There are no facts alleged which establish Defendant Keller
14 acted in any fiduciary capacity with Plaintiffs, such as
15 Defendant Keller offering Plaintiffs financial advice or
16 Plaintiffs providing Defendant Keller with confidential,
17 privileged information, believing they were in a position of
18 trust. Plaintiffs have not alleged any facts that create more
19 than a typical arm's length lending and servicing transaction.
20 Additionally, Plaintiffs have not alleged any facts that support
21 Defendant Keller, acting as trustee, acted more than a passive
22 agent for the parties.

23 Plaintiff's second claim for breach of fiduciary duty is
24 dismissed without prejudice.

25 3. Claim Three: Constructive Fraud

26 Constructive fraud exists when there is a breach of duty,
27 without actual fraudulent intent, in which the person at fault
28 gains an advantage by misleading another with whom they owed a

1 duty. Cal. Civ. Code § 1573. Constructive fraud depends on the
2 existence of a fiduciary relationship of some kind and arises
3 from a breach of duty in that relationship. Mark Tanner Constr.
4 v. Hub Internat. Ins. Servs., 224 Cal. App. 4th 574, 588 (2014);
5 Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 207
6 (2012); Barrett v. Bank of Am., 183 Cal. App. 3d 1362, 1369
7 (1986); Darrow v. Robert A. Klein & Co., 111 Cal. App. 310, 316
8 (Cal. Dist. Ct. App. 1931). Like fraud claims, an action for
9 constructive fraud requires a heightened pleading standard in
10 which the action must be pled with specificity. Schauer v.
11 Mandarin Gems of Cal., Inc., 125 Cal. App. 4th 949, 960 (2005).

12 Here, Plaintiffs argue Defendant Keller committed
13 constructive fraud in violation of California Civil Code § 1573
14 because Plaintiffs reasonably relied on Defendant Keller as the
15 substituted trustee to comply with California Civil Code § 2941.
16 SAC ¶ 58. Plaintiffs state Defendant Keller's failure to
17 provide Plaintiffs a copy of the recorded Substitution and Full
18 Reconveyance of the Deed of Trust caused damages to Plaintiffs.
19 Id. Defendant Keller's failure to disclose to the other
20 defendants that the May 2022 Refinanced Equity Loan was
21 reconveyed and repurchased was a substantial factor in causing
22 Plaintiffs' harm. Id. ¶¶ 59, 60.

23 Defendant Keller argues it did not owe Plaintiffs a
24 fiduciary duty, thus, Plaintiffs' constructive fraud claim
25 fails. Mem. in Supp. of Mot. at 11:13-19. The Court agrees.

26 First, as detailed above, Plaintiffs have failed to show
27 that Defendant Keller owed Plaintiffs a fiduciary duty, or that
28 it was in a position of trust or confidence. Absent facts

1 demonstrating a fiduciary relationship, Plaintiffs' constructive
2 fraud claim fails.

3 Second, Plaintiffs have failed to allege that Defendant
4 Keller, or any other party, gained any advantage by Defendant
5 Keller's failure to disclose that the May 2022 Refinanced Equity
6 Loan was reconveyed and repurchased.

7 Third, Plaintiffs repeatedly state that Defendant Keller's
8 failure to provide the copy of the recorded Substitution and
9 Full Reconveyance of Deed of Trust caused Plaintiffs' damages.
10 Plaintiffs, however, have failed to allege facts demonstrating
11 causation to establish "but-for" Defendant Keller failing to
12 provide the documentation, Plaintiffs would not have been
13 injured.

14 For all these reasons, Plaintiffs' claim for constructive
15 fraud is dismissed without prejudice.

16 4. Request for Attorney's Fees

17 Defendant Keller requests the Court dismiss Plaintiffs'
18 claim for attorney's fees. Mot. at 2. Under California law, the
19 prevailing party is not entitled to attorney's fees unless
20 provided for by contract or statute. Cal. Code Civ. Proc. §
21 1021; See also Cal. Code Civ. Proc. § 1033.5(a)(10) (establishing
22 attorney's fees are allowable as costs when authorized by (a)
23 contract; (b) statute; or (c) law.).

24 Plaintiffs have not cited to a statute or any other law that
25 entitles them to attorney's fees in this case. Under California
26 Civil Code § 1717, Plaintiffs also cannot recover attorney's fees
27 unless the action is under the contractual obligations set forth
28 in the deed of trust. Cal. Civ. Code § 1717. Because

1 Plaintiffs' breach of contract claim fails, there is no action on
2 the deed of trust and Plaintiffs are not entitled to attorney's
3 fees.

4 Plaintiffs' claim for attorney's fees is dismissed without
5 prejudice.

6 5. Punitive Damages Claim

7 Defendant Keller also requests an Order dismissing
8 Plaintiffs' claim for punitive damages. Mot. at 2. Defendant
9 Keller argues Plaintiffs fail to allege any facts in which
10 fraudulent, malicious, or oppressive conduct could be inferred.
11 Mem. in Supp. of Mot. at 14 (citing Kelley v. Corr. Corp. of Am.,
12 750 F.Supp.2d 132, 1447 (E.D. Cal. 2010)).

13 If a cause of action bars recovery of certain damages, the
14 request for damages can be dismissed in a Rule 12(b)(6) motion.
15 Vaughan v. Anderson Reg'l Med. Ctr., 849 F.3d 588, 590 (5th Cir.
16 2017); Beluca Ventures LLC v. Einride Aktiebolag, No. 21-CV-
17 06992-WHO, 2022 WL 17252589, at *5 (N.D. Cal. Nov. 28, 2022)
18 (determining if punitive damages are unavailable as a matter of
19 law, a motion to dismiss under Rule 12(b)(6) is procedurally
20 proper.).

21 California Civil Code § 3294(a) allows punitive damages
22 under certain circumstances by way of "punishing the defendant"
23 in actions not arising from a contract. Here, Plaintiffs claims
24 for breach of fiduciary duty and constructive fraud were the only
25 non-contractual claims against Defendant Keller. Both claims
26 have been dismissed.

27 Given the failure of Plaintiffs to properly plead a tortious
28 claim against Defendant Keller, as a matter of law, Plaintiffs

request for punitive damages also fails and is dismissed without prejudice. Copelan v. Infinity Ins. Co., 359 F.Supp.3d 926, 930 (C.D. Cal. 2019) (determining punitive damages request fails when underlying claims fail).

III. ORDER

For the reasons set forth above, the Court GRANTS Defendant Keller's Motion to Dismiss claims one, two and three against it WITHOUT PREJUDICE. The Court also GRANTS Defendant Keller's Motion to Dismiss Plaintiffs' request for attorney's fees and punitive damages WITHOUT PREJUDICE. If Plaintiffs elect to amend their complaint, they shall file their Third Amended Complaint within twenty days (20) of this Order. Defendants' responsive pleadings are due twenty days (20) thereafter.

IT IS SO ORDERED.

Dated: October 12, 2023


JOHN A. MENDEZ
SENIOR UNITED STATES DISTRICT JUDGE